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IN THE

Supreme Court of the United States

154

OCTOBER TERM, 1963

No. [redacted]

FIDELITY-BALTIMORE NATIONAL BANK,
A BODY CORPORATE, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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June, 1964

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on March 10, 1964.

Citations To Opinions Below

The opinion of the District Court, printed in Appendix B hereto, *infra*, p. 6a, is reported in 213 F. Supp. 631. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 18a, is reported in 328 F. 2d 953.

Jurisdiction

The judgment of the Court of Appeals was entered on March 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

Question Presented

A national bank and a state bank combine their assets under the National Banking Act. The stockholders of the state bank receive shares of stock of the combined bank for their shares of stock of the state bank. Portfolio securities of the state bank become the property of the combined bank. The question presented is whether any federal documentary stamp tax liability arises under these circumstances.

Statutes Involved

The statutory provisions involved are the National Banking Act, 12 U.S.C., §34a, and the Internal Revenue Code (1939), §§1802(a), 1802(b) and 3481(a). They are printed in Appendix A, *infra*.

Statement

On July 16, 1954, Baltimore National Bank ("Baltimore National"), a national banking association with its principal office in Baltimore, Maryland, and The Fidelity Trust Company ("Fidelity"), a Maryland-chartered bank, also with its principal office in Baltimore, Maryland, consolidated under the charter of Baltimore National and under the name Fidelity-Baltimore National Bank and Trust Company (later changed to Fidelity-Baltimore National Bank), Petitioner herein (R. App. 11).[1] This consolidation was effected under the National Banking Act, 12 U.S.C. §34a

[1] As used in this Petition, "R. App." refers to the appendix record below.

(R. App. 10). Pursuant to the agreement of consolidation, 143,750 shares of new common stock of Petitioner were exchanged for all of the outstanding common stock (125,000 shares) of Baltimore National; 156,160 shares of new common stock of Petitioner were exchanged for all of the oustanding common stock (97,600 shares) of Fidelity (R. App. 11). The shares of new common stock of Petitioner exchanged for the shares of Fidelity were issued by Petitioner directly to the stockholders of Fidelity (R. App. 11-12).

The Commissioner of Internal Revenue determined that the original issue stamp tax applied to the 156,160 shares of Petitioner's common stock that went to the stockholders of Fidelity, and that the stamp tax on transfers applied to the transfer by Fidelity to its stockholders of its right to receive these 156,160 shares (R. App. 12). The Commissioner also imposed the transfer stamp tax on securities in the portfolio of Fidelity which became the property of the consolidated association (R. App. 12-13). Petitioner made payment of these taxes and filed a timely claim for refund of them, which was disallowed by the Commissioner (R. App. 13).

Petitioner sued Respondent in the District Court for refund of the stamp taxes it had paid as a result of the consolidation of Baltimore and Fidelity. The jurisdiction of the District Court was invoked because the case arises under the internal revenue laws of the United States. The case was presented to the District Court on an agreed stipulation of facts. The District Court ordered a refund of both the original issue and transfer stamp taxes on the shares of Petitioner exchanged for Fidelity shares and on the portfolio securities of Fidelity (Appendix B, *infra*, p. 17a). Respondent appealed this decision of the District Court to the Court of Appeals for the Fourth Circuit. No

appeal was taken by Petitioner from a portion of the decision of the District Court adverse to it.

The basis of the decision of the District Court is a provision of the National Banking Act, 12 U.S.C., §34a (1952 ed.) (hereinafter referred to as §34a)[2] (Appendix B, *infra*, p. 2a). Section 34a provided that the identity of each of the constituent banks in a consolidation of a state bank and a national bank "shall be merged into and continued in the consolidated national banking association [which] shall be deemed to be the same corporation as each of the constituent institutions" (Appendix A, *infra*, p. 3a). The District Court held that this provision made the original issue and transfer stamp taxes inapplicable to shares of stock of the consolidated national banking association exchanged for shares of stock of Fidelity, and to the portfolio securities of Fidelity (Appendix B, *infra*, p. 16a).

The Court of Appeals reversed the decision of the District Court. The basis for its reversal is that §34a should not be given effect in determining the original issue and transfer stamp tax liability arising as a result of the consolidation of two banks under the provisions of the National Banking Act (Appendix B, *infra*, p. 28a). The Court of Appeals held that the "consolidation" was actually a classic "merger", in which Fidelity lost its corporate identity, despite the plain language of §34a saying that the identity of Fidelity is continued (Appendix B, *infra*, p. 27a).

Reasons For Granting Writ

1. This case presents an important and novel question of construction of a federal statute.

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[2] §34a is printed in full in Appendix A, *infra*, p. 2a. §34a was shifted to 12 U.S.C. §215(e) in the 1959 amendment to the National Banking Act, without changing the substance of the language governing the case at bar.

Both the pertinent portion of §34a of the National Banking Act and the stamp tax provisions of the Internal Revenue Code dealing with issuance and transfer of securities have been in effect for many years. Nonetheless, there has never been a case prior to this one presented to the courts concerning the inteaction of §34a and these stamp tax provisions. The question here is a novel one. The importance of the question in the administration of the stamp tax provisions of the Internal Revenue Code is pointed up by the large number of combinations of state and national banks under the National Banking Act in recent years. This is a trend often noted of late. In every one of these combinations, the present question of stamp tax liability has or will come up. There is a real need for a definite answer, applicable all over the country.

The decision below is bound to call attention to the problem. Sooner or later, the same question will be raised in the other federal judicial circuits. As is more fully discussed below, a conflict among the circuits is almost certain to develop. A decision now by this Court of the issue in this case will prevent much litigation and will bring certainty to a troubled area of federal law. A prompt settlement of this question of the proper inter-relationship of two major federal statutes will be of certain public benefit. While the amount of revenue involved in this area cannot be estimated with any degree of accuracy, it seems fair to say that it is probably substantial.

2. The decision below conflicts in principle with the decisions in *United States v. Northwestern Nat. Bank & T. Co. of Minneapolis*, 137 F. 2d 761 (8th Cir. 1943), and *Old Nat. Bank in Evansville v. Commissioner*, 256 F. 2d 639 (7th Cir. 1958).

Both of the cited cases involved the effect of §34a on the federal tax liability of banks which had consolidated under

the provisions of the National Banking Act. In the *Northwestern Nat. Bank* case, the issue was the post-consolidation applicability of capital stock taxes on the value of the assets of the consolidated banking association contributed by the former state bank. The decision was that the capital stock taxes did not apply to such assets because of §34a. The court held that the consolidated association received no property which it did not own before the consolidation, since §34a provided that the consolidated association was deemed the same as each of its constitutents. The *Old Nat. Bank* case involved excess profits taxes. The question was whether a consolidated association consisting of a national bank and a state bank could make use of an unused excess profits tax credit of the state bank. The lower court had denied the credit to the consolidated association on the ground that it was not the same business as that carried on by the state bank. In reversing, the appellate court held that §34a continued the existence of the state bank in the consolidated association.

In each of the cited cases, the court in determining federal tax liability gave literal effect to the language of §34a relied on in the present case. In its opinion in the present case, the court below stated, with reference to the *Northwestern Nat. Bank* case, that it supports the taxpayer's position. (Appendix B, *infra*, p. 26a). The court goes on to say that it finds the case unpersuasive. With respect to the *Old Nat. Bank* case, the opinion below states that it has little bearing upon the present question (Appendix B, *infra*, p. 26a). A reading of that decision does not support that conclusion. The opinion in *Old Nat. Bank* indicates that great weight was placed on the pertinent language from §34a.

A reading of the opinions in the two cited cases makes it clear that the decision of the court below in this case

is in direct conflict with the principle upon which those cases were based. Those cases gave the same effect to the pertinent language of §34a as did the District Court in this case. They are the only decided cases involving the effect to be given §34a in determining federal tax liability. The presence of this clear conflict of principle can only give rise to further litigation in this area. This will lead to an eventual and inevitable conflict in fact, as well as in principle, when the issue in the present case comes up for decision in the circuits in which the cited cases were decided or in other circuits. It is clearly desirable and in the public interest that future litigation be avoided by a present determination of the issue that will be binding on all federal courts.

3. The decision below is erroneous.

The decision of the District Court in the instant case is in harmony with the precedents in this area and with the plain meaning of the statutory language used in §34a. As is said in *Northwestern Nat. Bank & T. Co. of Minneapolis*, 137 F. 2d 761, 763 (8th Cir. 1943), "the effect of the merger or consolidation depends upon the statute authorizing it." That is exactly what the District Court decided in the instant case.

The Court of Appeals goes to great lengths in trying to find some way to rationalize its decision not to apply §34a as it is plainly written. It does so by falling back upon the legislative history of §34a. It concludes that §34a was adopted "as a response to a particular problem" (Appendix B, *infra*, p. 23a). The problem was that the amalgamation of national and state banks was being impeded because [redacted] loss of legal identity by the state bank caused a loss of fiduciary appointments (Appendix B, *infra*, p. 23a). While this may be a correct interpretation of the reason for the

enactment of the provision of §34a involved in the present case, there is nothing in that provision indicating that it was meant to be limited to situations involving fiduciary appointments. Certainly the cases, referred to above, applying §34a where federal tax liability was involved indicate no such limitation. The District Court clearly recognized this (Appendix B, *infra*, p. 13a).

The opinion of the District Court states that §34a "clearly creates a type of corporate union, separate and distinct from classical concepts of merger and consolidation" (Appendix B, *infra*, p. 13a). This is the fundamental point in the case. It is perfectly clear, from the differing federal documentary stamp tax treatment of classical mergers and classical consolidations (Appendix B, *infra*, p. 21a), that stamp tax consequences depend upon the technical legal effect of the particular statutory provisions governing the corporate combination. The technical continuity, in a classical merger, of the legal existence of one of the corporations involved saves it from stamp taxes on stock of the combined entity received by its shareholders. In a classic consolidation, where neither corporation survives technically, no such saving is achieved. The economic result is the same in both situations, but the stamp tax consequences are not, since they turn on legal form and not economic substance. The state statutes governing mergers and consolidations were not passed with stamp tax consequences in mind, any more than was §34a. Yet no one suggests that these state statutes be disregarded in determining stamp tax liability. They are given literal effect for that purpose. Section 34a should not be treated differently from other statutory provisions dealing with corporate combinations in determining stamp tax liability. The language of §34a, upon which the present case turns, is perfectly clear and should be given effect accordingly. This the court below failed to do.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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GEORGE D. HUBBARD,
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June, 1964

APPENDIX A

Internal Revenue Code (1939)

Sec. 1802. Capital Stock (and Similar Interests).

(a) *Original Issue.*—On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interests in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment trust or similar organization) holding or dealing in any of the instruments mentioned or described in this subsection or section 1801 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this title), on each $100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 11 cents: * * * [as amended by Sec. 521 of the Revenue Act of 1941, c. 412,55 Stat. 687, and by the Act of August 8, 1947, c. 518,61 Stat. 921].

(b) *Sales and Transfers.*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificate of such corporation or other organization (or of the shares where no certificates were issued) 5 cents and where such shares or certificates are without par or face value, the tax shall be 5 cents on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share, as the case may be) * * *. [as amended by Sec. 521 of the Revenue Act of 1941, *supra*].

* * * * * *

§3481. *Transfer of bonds*

(a) *Imposition of tax.* On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the instruments mentioned or described in section 1801 and of a kind the issue of which is taxable thereunder, whether made by any assignment in blank or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such instrument or not), on each $100 of face value or fraction thereof, 5 cents: * * *.

Title 12, United States Code (1952 ed.), Banks and Banking

Sec. 34a. *Consolidation of state bank, etc., with national bank; capital stock; dissenting shareholders.*

Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same State, county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such State bank if the laws of the State where the same is organized so require, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper of general circulation published in the place where the said association or bank is situated, and in the legal newspaper for the publication of legal notices or advertisements, if any such paper has been designated by the rules of a court in the county where such association or bank is situated, and if no newspaper is published in the place, then in a paper of general circulation published

nearest thereto, unless such notice of meeting is waived in writing by all stockholders of any such association or bank, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where the same is organized. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located. *Upon such a consolidation, or upon a consolidation of two or more national banking associations under section 33 of this title, the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions.* All the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation: *Provided, however*, That where any such constituent institution at the time of such consolidation was acting under appointment of any court as trustee, executor, administrator, registrar of stocks and bonds,

guardian of estates, assignee, receiver, committee of estates of lunatics or in any other fiduciary capacity, the consolidated national banking association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such constituent corporation prior to the consolidation, and nothing herein contained shall be construed to impair in any manner the right of any court to remove such consolidated national banking association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any such consolidated association be removed solely because of the fact that it is a national banking association. If such consolidation shall be voted for at said meetings by the necessary majorities of the shareholders of the association and of the State or other bank proposing to consolidate, and thereafter the consolidation shall be approved by the Comptroller of the Currency, any shareholder of either the association or the State or other bank so consolidated, who has voted against such consolidation at the meeting of the association of which he is a stockholder, or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, shall be entitled to receive the value of the shares so held by him if and when said consolidation shall be approved by the Comptroller of the Currency, such value to be ascertained as of the date of the Comptroller's approval by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors of the consolidated association, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to such shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and the consolidated association shall pay the expenses of reappraisal, and the value as ascertained by such appraisal or reappraisal shall be deemed to be a debt due and shall be forthwith paid to said shareholder by said consolidated association, and the shares

so paid for shall be surrendered and, after due notice, sold at public auction within thirty days after the final appraisement provided for in this section; and if the shares so sold at public auction shall be sold at a price greater than the final appraised value, the excess in such sale price shall be paid to the said shareholder; and the consolidated association shall have the right to purchase such shares at public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price as its board of directors by resolution may determine. The liquidation of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases if such provision is made in the State law; otherwise as hereinbefore provided. No such consolidation shall be in contravention of the law of the State under which such bank is incorporated.

The words "State bank", "State banks," "bank", or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

Where a dissenting shareholder was given notice as provided in this section to the bank of which he is a shareholder of his dissent from the plan of consolidation and the directors thereof fail for more than thirty days thereafter to appoint an appraiser of the value of his shares, said shareholder may request the Comptroller of the Currency to appoint such appraiser to act on the appraisal committee for and on behalf of such bank. In the event one of the appraisers fails to agree with the others as to the value of said shares, then the valuation of the remaining appraisers shall govern. [As added by Sec. 1 of the Act of February 25, 1927, c. 191, 44 Stat. 1225, and amended by Sec. 24 of the Banking Act of 1933, c. 89, 48 Stat. 162, and Sec. 331 of the Banking Act of 1935, c. 614, 49 Stat. 684.] (Emphasis added.)

* * * * * *

APPENDIX B

OPINION OF THE DISTRICT COURT

Winter, District Judge:

As an incident to the corporate marriage of Baltimore National Bank, a national banking association (hereafter called "Baltimore"), and The Fidelity Trust Company, a Maryland chartered state bank (hereafter called "Fidelity"), the Commissioner of Internal Revenue determined that the resulting Fidelity-Baltimore National Bank & Trust Company (hereafter called "Fidelity-Baltimore"), was liable for original issue and documentary stamp tax for shares of Fidelity-Baltimore issued to shareholders of Baltimore and Fidelity. Fidelity-Baltimore paid the taxes, filed timely claims for refund, and, when these were disallowed, instituted this action.

FACTS

Prior to July 16, 1954, Baltimore had issued and outstanding 125,000 shares of common stock, having a par value of $10.00 per share, a total capitalization of $1,250,000.00, and Fidelity had issued and outstanding 97,600 shares of common stock, having a par value of $25.00 per share, a total capitalization of $2,440,000.00.

By agreement dated April 30, 1954, subject to the approval of the stockholders of both institutions and the Comptroller of the Currency (all of which approvals were forthcoming, so that the agreement became effective on July 16, 1954), Baltimore and Fidelity agreed that they should be "consolidated under the charter of Baltimore National Bank," the name of the consolidated association to be known as Fidelity-Baltimore National Bank & Trust Company. The capital structure of Fidelity-Baltimore was established in the aggregate amount of not less than $14,111,806.00, consisting of capital stock of $3,000,000.00, divided into 300,000 shares of the par value of $10.00 each, surplus of $10,000,000.00, and undivided profits of not less than $1,111,806.00.

After providing for the contribution of Baltimore and Fidelity to Fidelity-Baltimore, which in the case of Fidelity required it, *inter alia*, to transfer its portfolio of securities, the agreement specified that the 300,000 shares of $10.00 common stock of Fidelity-Baltimore should be distributed as follows: The shareholders of Baltimore received in exchange for their old shares 143,750 shares of new common stock. Thus, for each share of old $10.00 common stock, 1.15 shares of the new $10.00 common stock was issued and distributed. The shareholders of Fidelity received in exchange for their Fidelity shares 156,160 shares of new common stock. Thus, for each share of the $25.00 par value common stock of Fidelity, 1.6 shares of the new $10.00 par value common stock was issued and distributed. Distribution to shareholders of Fidelity was made directly in exchange for their old Fidelity stock. In this fashion, 299,910 shares of the 300,000 shares of new common stock were allocated and distributed. The balance of 90 shares was sold to the public.

Fidelity-Baltimore voluntarily paid documentary stamp tax on these 90 shares. The Commissioner determined that Fidelity-Baltimore owed additional tax as follows:

	Amount of Tax
(a) Original issue tax based on the par value of the 156,160 shares issued to shareholders of Fidelity;	$1,833.26
(b) Original issue tax on the 143,750 shares, to the extent they represented newly dedicated capital issued to shareholders of Baltimore;[1]	208.29

[1] The amount of original issue tax on stock issued to shareholders of Baltimore was based on the following recapitalization formula:

Capitalization under new issue	143,750 shares at $10 per share =	$1,437,500
Capitalization under old issue	125,000 shares at $10 per share =	1,250,000
Difference representing amount transferred to capital account for first time		$ 187,500

(c) Transfer tax based on the transfer by Fidelity to its old shareholders of its right to receive 156,160 shares of Fidelity-Baltimore; and	802.30
(d) Transfer tax on securities in Fidelity portfolio	862.35
Total	$3,760.20

Additionally, the Commissioner assessed interest in the amount of $903.50, so that the total paid by Fidelity-Baltimore, and sought to be recovered in this action, is $4,609.70, with interest at the rate of 6% per annum from August 15, 1958.

Discussion and Opinion

The taxes asserted by the Commissioner were prescribed by the Internal Revenue Act of 1939, as amended, in effect on July 16, 1954, because the transactions allegedly giving rise to liability for the taxes were all concluded before the effective date of the Internal Revenue Act of 1954, which was January 1, 1955. Section 1800 of the Internal Revenue Act of 1939, 26 U.S.C. (Internal Revenue Code, 1939, as amended), §1800, provides that "[T]here shall be levied, collected, and paid * * * the several taxes specified * * *" in §§1800 to 1807, inclusive. Thus included is §1802, which deals with capital stock and similar interests, and its pertinent provisions are set forth below.[2]

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[2] "Sec. 1802. Capital Stock (and Similar Interests).

"(a) *Original Issue.* On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interests in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment trust or similar organization) holding or dealing in any of the instruments mentioned or described in this subsection or section 1801 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this title), on each $100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization, 11 cents: * * * *Provided further*, That where such certificates (or shares, where no certificates are issued) are issued in a recapitalization, the tax payable shall be that proportion of the tax computed on such certificates or shares issued in the recapitalization that the amount dedicated as capital for the first time

It seems clear that, except for the fact that Baltimore (and, as it was subsequently known, Fidelity-Baltimore) is a national banking association, the significance of which is hereafter discussed, the taxes levied and collected by the Commissioner were properly levied and collected, and taxpayer would be entitled to no refund. The application of the taxes to the transaction previously described, if both of the participating corporations were ordinary business corporations chartered under state law, is readily apparent from brief reference to the Treasury Regulations in force and effect on January 1, 1954 relative to documentary stamp taxes, and the statute itself. Section 113.24 of those Regulations states, with regard to the original issue tax:

> "The following are examples of issues subject to the taxes:
>
> "(g) Stock issued by a consolidated corporation in exchange for stock of the consolidating corporation.

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by the recapitalization, whether by a transfer of earned surplus or otherwise, bears to the total par value (or actual value if no par stock) of such certificates or shares issued in the recapitalization. The stamps representing the tax imposed by this subsection shall be attached to the stock books or corresponding records of the organization and not to the certificates issued.

"(b) *Sales and Transfers.* On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interests, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 5 cents and where such shares or certificates are without par or face value, the tax shall be 5 cents on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share, as the case may be).

* * * * * *

"(c) *Transfers by Operation of Law.* No delivery or transfer under subsection (b) not otherwise exempt shall be exempt because effected by operation of law. * * *"

> "(h) Stock issued in connection with a merger by the continuing corporation to the stockholders of the merging corporation; and, under certain circumstances, stock issued to the stockholders of the continuing corporation."[3]

Insofar as the transfer tax is concerned, §113.33 renders the following transactions, whether effected by means of certificates, or other instruments, or by entries on the books of the issuing corporation, or other entity, or otherwise, taxable:

> "(h) Transfer upon a merger from the name of a merging corporation of stock owned by it to the name of the continuing corporation, since such a transfer arises by action of the parties and not wholly by operation of law. Similarly, upon a consolidation, a transfer from any of the consolidating corporations to the new or consolidated corporation."[4]

Thus, §1802(a) of the Act taxes original issues of stock whether or not made in connection with a reorganization or recapitalization, and §§113.24(g) and (h) of the Regulations specifically state that stock issued to the stockholders of a consolidating corporation in connection with a consolidation, and stock issued to the stockholders of the merging corporation, in connection with a merger, are subject to the original issue tax. If Baltimore and Fidelity were ordinary business corporations, there could be no question but that the stock of Fidelity-Baltimore issued to

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[3] Section 113.23(e)(2) treats with the application of the tax to stock issued to stockholders of a continuing corporation. Summarized, the section requires that the tax be paid when, as a result of the merger, the continuing corporation transfers capital surplus to capital and issues stock therefor to its stockholders. Viewed from the standpoint of Baltimore's stockholders, this is precisely what was done.

[4] In this connection, §113.34(h) and (i) renders *not* subject to the transfer tax, in the case of a consolidation, the surrender of stock of any of the consolidating corporations in exchange for stock of the new or consolidated corporation, and, in the case of merger, the surrender of stock of both the merging and continuing corporations in exchange for stock of the continuing corporation.

stockholders of Baltimore, at least to the extent that it represented a dedication of new capital, was subject to the original issue tax, and the stock issued to stockholders of Fidelity was also subject to the original issue tax, since Fidelity either merged into or consolidated with Baltimore. The stock of Fidelity-Baltimore issued to stockholders of Fidelity would also be subject to the transfer tax by virtue of the provisions of §1802(b) and §113.33(i) of the Regulations, because Fidelity would have the right to receive, as consideration for the transfer of its assets to Fidelity-Baltimore, 156,160 shares of Fidelity-Baltimore stock, and if the latter were then transferred by Fidelity to its shareholders a transfer tax would be due. Although the Fidelity-Baltimore stock went directly to Fidelity's stockholders, the legal effect, for purposes of taxation, is the same, *Raybestos-Manhattan Co. v. U. S.*, 296 U.S. 60 (1935); *U. S. Industrial Chemicals, Inc. v. Johnson*, 181 F. 2d 413 (2 Cir. 1950); and *American Processing & Sales Co. v. Campbell*, 164 F. 2d 918 (7 Cir. 1947). Also without question would be the application of the tax to the transfer by Fidelity of its portfolio of securities by virtue of the provisions of §1802(b) of the statute and §113.33(h) of the Regulations, when read in conjunction with §1802(c) of the statute, which was enacted to overcome the result in *United States v. Seattle Bank*, 321 U.S. 583 (1944).

But the taxpayer urges most strongly that the rules applicable to ordinary corporations are inapplicable to it, since Baltimore and Fidelity-Baltimore are national banking associations, and the corporate marriage between Baltimore and Fidelity was solemnized under the provisions of §34a of the National Banking Act, previously codified as 12 U.S.C.A., §34a, and now codified, in amended form, as 12 U.S.C.A., §215a. Insofar as pertinent, that section, after authorizing a bank incorporated under state law to consolidate with a national bank, and providing the mechanics whereby that result may be obtained, provides:

> "* * * Upon such a consolidation, or upon a consolidation of two or more national banking associations under section 33 of this title, *the corporate existence of*

each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions." (Emphasis supplied.)

Based upon §34a of the National Banking Act, and particularly the quoted italicized language, *supra*, Fidelity-Baltimore stresses the identity between it and its constituent parts. This argument is pressed as being applicable to the issuance and distribution of shares of Fidelity-Baltimore to the stockholders of Baltimore and Fidelity, so that the original issue tax does not apply,[3] nor the transfer tax to shares of Fidelity-Baltimore issued to stockholders of Fidelity. Fidelity-Baltimore argues that no securities owned by Fidelity were transferred to it, because Fidelity continued as part of the consolidated association.

The emphasized portion of §34a of the National Banking Act was originally enacted as part of the amendment to the National Banking Act of June 16, 1933, 48 Stat. 190. The legislative history of this portion of the amendment was considered in *Seattle-First National Bank v. United States*, 44 F.S. 603 (D.C. E.D. Wash: 1942), aff'd *sub nom. United States v. Seattle-First National Bank*, 136 F. 2d 676 (9 Cir. 1943), 321 U.S. 583 (1944), and it was there concluded that the purpose of the amendment was (p. 610), "* * * to speed up state and national consolidations," because "* * * even the tragedy of the bank collapse and the hardships of the bank holiday had not resulted in a sufficient attitude of cooperation upon the part of the state banks for strengthening the banking structure of the country by means of consolidation with federal national banks." As typical of state discouragement of state and national bank consolidations, see, *Ex Parte Worcester National Bank*, 279 U.S. 347 (1929), where, in the absence of the quoted language, a state de-

[3] To accomplish this result, Fidelity-Baltimore compares its aggregate issued capital to the aggregate issued capital of Baltimore and Fidelity.

termination that a national bank with which a state-chartered bank had been consolidated did not succeed to an executorship previously held by the state-chartered bank without a new appointment from the state probate court, was upheld; but, compare *New England M. Nat. Bank v. Centenary Methodist Ch.*, 342 Mass. 360, 173 N.E. 2d 294 (1961), decided after the amendment, in which a national bank with which a state-chartered bank had consolidated was permitted to continue as trustee of a trust, of which the state-chartered bank had been named trustee.

In accord with the latter, in this Circuit, *Dixon v. Cannon*, 115 F. 2d 913 (4 Cir. 1940), held that the exchange of stock of a consolidated national bank for stock of a state-chartered bank held by a trustee did not constitute a change of investment illegal under state law. This result was reached partially in reliance upon the quoted language, and would seem to be well within the original intention of Congress in adopting the amendment.

Given its literal meaning, §34a, while perhaps delving into the metaphysical (*Cf. Koppers Coal & Transportation Co. v. United States*, 107 F. 2d 706 (3 Cir. 1939)), clearly creates a type of corporate union, separate, and distinct from classical concepts of merger and consolidation, *U. S. v. Northwestern Nat. Bank & T. Co. of Minneapolis*, 137 F. 2d 761, 763 (8 Cir. 1943); Fletcher, *Cyclopedia of Corporations* (1961 Ed.), Vol. 15, §§7075, 7197-7199, because both of the original entities continues in existence in contemplation of law, if not in fact. The Government's argument that the union of Baltimore and Fidelity was either a merger or a consolidation, and that tax treatment provided in the above quoted Regulations, applicable to either mergers or consolidations necessarily follows, cannot be supported.

Notwithstanding its original limited purpose to supersede state legislation, which had the practical effect of discouraging the consolidation of state-chartered banks with national banks, the emphasized language of §34a has been given wider application. Of great significance to the case at bar are the holdings where the emphasized language of §34a

has been literally applied to give effect to the construction and application of federal tax statutes. In *United States v. Northwestern Nat. Bank & T. Co. of Minneapolis, supra,* the problem presented was one of the application of capital stock taxes where a state bank and a national bank consolidated under the charter of the national bank. The taxes were paid initially on the value of the assets of the consolidated association contributed by the state bank, but a refund of taxes was permitted on the theory that, by virtue of the quoted language, the consolidated association was deemed the same as each of its constituents and, therefore, no property was received by the consolidated association that was not owned before the union.[6]

Old Nat. Bank in Evansville v. Commissioner of Int. Rev., 256 F. 2d 639 (7 Cir. 1958), concerned excess profits taxes and presented the problem of whether the unused excess profits tax credit of a state bank, which had been consolidated with a national bank, could be used by the consolidated association. A Tax Court determination denying use of the credit, on the ground that the consolidated association was not the same business as that carried on by the state bank, was reversed on appeal, because of §34a of the National Banking Act, which stated that the state-chartered bank was continued in the consolidated association, and the consolidated association shall be deemed to be the same corporation as the state bank.

In an effort to avoid the persuasiveness of these authorities, which, while not dealing with the precise taxes in question here, generally stand for the proposition that the

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[6] 137 F. 2d 761, 763:

"Taxation can be imposed here only if property or cash was paid in for shares, or was received so as to constitute paid-in surplus or contributions to capital. Sec. 701(f), Revenue Act 1934. Since by the very language of the statute, the consolidated association must be deemed to be the same corporation as each of the constituents, it necessarily follows that nothing could be received in the form of property that it did not have before the union. The effect of the merger or consolidation depends upon the statute authorizing it. Cannon v. Dixon, 4 Cir., 115 F. 2d 913; Pennsylvania Co. v. Commissioner, 3 Cir., 75 F. 2d 719; Keokuk & W. R. Co. v. State of Missouri, 152 U.S. 301, 14 S. Ct. 592, 38 L. Ed. 450."

quoted language should be literally applied to brush aside logical distinctions between mergers and consolidations ordinarily drawn by state and federal law, and whether, factually, a consolidating or merging entity continues to exist and whether a new entity results, the Government cites *United States v. Seattle Bank*, 321 U.S. 583 (1944), as a case which, not explicitly but necessarily, decided that Fidelity and Fidelity-Baltimore must be treated as two separate entities, in spite of the emphasized language of §34a.

This case arose from a merger of a state and national bank under §34a of the National Banking Act. The state bank owned a portfolio of securities in its own right, which were transferred to the national bank as a part of the corporate union. Insofar as pertinent here, the issue in this case was the correctness of the assessment of the transfer tax under §800 of the Revenue Act of 1926 which, with one exception, was the same as 26 U.S.C.A. §1802 under consideration here. The Supreme Court held the tax inapplicable on the ground that the transfer of the state bank's assets to the national bank took place by operation of law, the predecessor statute of §1802 not then containing the specific language of §1802(c), rendering immaterial whether the transfer took place by operation of law or not.

It is urged that the significance of the case lies in the fact that the Supreme Court decided the case on the issue of exemption by operation of law, because it is claimed the exemption issue would not have been reached if literal meaning were given to the language of §34a, added by the 1933 Amendment. Hence, it is argued that *Seattle Bank* constitutes an adjudication adverse to the contentions of Fidelity-Baltimore.

Unquestionably, it is true that if literal meaning were given to the language of §34a the actual issue passed upon need not have been considered. An examination of the successive adjudications in the case discloses that the District Court decided the case on both grounds (44 F.S. 603, 609-610), as did the Court of Appeals for the Ninth Circuit (136 F. 2d 676). The lack of mention by the Supreme Court

of the point that §34a would render the transaction exempt is not of great significance, because the Supreme Court took jurisdiction of the case to settle an apparent conflict between the circuits on whether transfers by operation of law were within the scope of the predecessor statute to §1802. The conflict arose from the decisions of the Ninth Circuit in the *Seattle Bank* case and *United States v. Merchants Nat. Trust & Savings Bank*, 101 F. 2d 399 (9 Cir. 1939), the Second Circuit in *City Bank Farmers Trust Co. v. Hoey*, 125 F. 2d 577 (2 Cir. 1942), and the First Circuit in *State Street Trust Co. v. Hassett*, 134 F. 2d 156 (1 Cir. 1943). Of these, the latter two cases involved only state-chartered banks, and arose when securities held as trustee or custodian, were reregistered following corporate union. True, the *Seattle Bank* case might have been decided as the Government urges it should be construed, but such a decision would be foreign to the reason why the writ of certiorari was issued. Because of this reason, I do not consider that the *Seattle Bank* case even impliedly passed upon the effect of §34a of the National Banking Act, and is not authority decisive of the issues here.

Nor is *First Trust Co. of St. Paul v. United States*, 15 F.S. 634 (D.C. Minn. 1936), authority contrary to the taxpayer's position here. That case rejected as binding upon federal taxing authorities the language of a state statute, as construed by a state court, under which two state-chartered banks were joined, in upholding the application of the capital stock tax to the consolidated corporation. The result was reached upon the basic principle that federal tax statutes are to be construed by federal law, and the determination of a state court in regard to a state statute deeming the consolidated corporation as a continuation of the corporate existence of the consolidating corporations, but, falling short of a direct statement such as found in §34a that they shall be deemed the same, was not binding on the federal tax authorities.

When literal application is made of the language in §34a, it necessarily follows that in most part Fidelity-Baltimore's contentions are correct and not all of the

taxes assessed by the Commissioner can be upheld. When Fidelity-Baltimore is deemed the same as Fidelity, it necessarily follows that a transfer tax may not be imposed on the transfer of Fidelity's portfolio of securities, or on the transfer to Fidelity's stockholders of Fidelity's right to receive stock of Fidelity-Baltimore, because there has been no change of ownership from one separate entity to another separate entity.

When Fidelity-Baltimore is deemed the same as Fidelity, original issuance taxes apply only to the extent that the exchange of $25.00 par value stock for $10.00 par value stock resulted in a dedication of additional capital. Since Fidelity's initial capitalization was $2,440,000.00, consisting of 97,600 shares of $25.00 par value stock, and since there was substituted therefor 156,160 shares of $10.00 par common stock, having an aggregate par value of $1,561,600.00, there was no dedication of new capital and, hence, no tax is payable.

When Fidelity-Baltimore is treated the same as Baltimore, 143,750 shares of $10.00 par value stock, having an aggregate par value of $1,437,500.00, was exchanged for 125,000 shares of $10.00 par value common stock, for a total par value of $1,250,000.00, so there is the dedication of new capital, in the aggregate amount of $187,500.00, on which the original issuance tax does apply.

Judgment will be entered for Fidelity-Baltimore for a refund of all taxes paid, except the original issue tax on the new capital of Fidelity-Baltimore, in the aggregate amount of $187,500.00. Counsel may compute the amount of refund due Fidelity-Baltimore and prepare an appropriate judgment.

OPINION OF COURT OF APPEALS

United States Court of Appeals for the Fourth Circuit

No. 9078

Fidelity-Baltimore National Bank, a body corporate,
Appellee,

versus

United States of America, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE
HARRISON L. WINTER, District Judge

(Argued October 4, 1963. Decided March 10, 1964.)

Before HAYNSWORTH, BOREMAN and BRYAN, Circuit Judges.

Bernard J. Schoenberg, Attorney, Department of Justice, (Louis F. Oberdorfer, Assistant Attorney General, Meyer Rothwacks and Philip R. Miller, Attorneys, Department of Justice, Joseph D. Tydings, United States Attorney, and Robert W. Kernan, First Assistant United States Attorney, on brief) for Appellant, and George D. Hubbard (Semmes, Bowen & Semmes on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

Sometime after the merger of a national bank and a state bank, to operate thereafter under the charter of the national bank, the Commissioner asserted the stamp tax obligations which are the subject of this controversy. He contended that original issue stamp taxes were required,

measured by the aggregate par value of the stock issued to the stockholders of the state bank, and, in addition, measured by the aggregate par value of the stock issued to the stockholders of the national bank to the extent that amount exceeded the aggregate par value of the stock of the national bank previously outstanding. He also asserted a transfer tax on the transfer from the state bank to its stockholders of its right to receive stock of the merged bank in exchange for its assets and upon the transfer from the state bank to the national bank of its portfolio of securities. The asserted stamp taxes were paid, and subsequently a suit for refund was begun. On the basis of a provision of §3 of the National Banking Act[1] that the identity of each of the constituent banks "shall be merged into and continued in the consolidated national banking association [which] shall be deemed to be the same corporation as each of the constituent institutions," the District Court held that no transfer tax was due because no transfer had taken place. Similarly, it held that no original issue stamp taxes were due upon the issuance of stock of the consolidated bank to former stockholders of the state bank.

Under an agreement dated April 30, 1954 and effective July 16, 1954, Fidelity Trust Company, a bank organized and theretofore operated under the laws of Maryland, was merged into the Baltimore National Bank, a national bank organized and theretofore operated under the National Banking Act. The "Agreement of Consolidation" provided that the two institutions "shall be consolidated under the charter of the Baltimore National Bank, and that its name would thereafter be changed to Fidelity-Baltimore National Bank & Trust Company." Under the Agreement of Consolidation, the stockholders of Baltimore received 143,750 new shares of $10 par stock in exchange for the 125,000 shares of $10 par stock theretofore outstanding. It is conceded that original issue stamp taxes are due with respect

[1] 12 U.S.C.A. §34a, hereinafter referred to as §34a. In 1959 the National Banking Act was substantially amended. Provisions comparable to those of 12 U.S.C.A. §34a, in effect at the time of the Baltimore-Fidelity merger, now appear in altered form in 12 U.S.C.A. §215.

to the issuance of the additional 18,750 shares issued to former stockholders of Baltimore, for they represented an additional capitalization of retained earnings. Fidelity's stockholders, however, received 156,160 shares of the new $10 par stock in exchange for their 97,600 shares of Fidelity's old $25 par stock. Thus, Fidelity's stockholders received new stock having an aggregate par value of $1,561,600 in exchange for the old stock having an aggregate par value of $2,440,000, so that the issuance of the new stock to them was a reduction rather than an increase in nominal capital.

Under the agreement, of course, the portfolio of securities held by each of the banks became vested in the consolidated institution.

The Commissioner's theory was that under the Agreement of Consolidation, as required by the National Banking Act, the resulting institution operated under the charter of old Baltimore, and, in legal effect, was still that same corporate entity. Thus, to the extent that the aggregate par value of new stock issued to Baltimore's old stockholders did not exceed the aggregate par value of their old stock, he asserted no original issue stamp taxes. Nor did he assert any transfer stamp taxes because of the transfer of Baltimore's portfolio of Securities to the consolidated institution, for, in his view, old Baltimore and the consolidated institution being the same, no transfer had occurred. However, he refused to recognize any continuation in the consolidated institution of Fidelity's earlier identity, and he asserted original issue stamp taxes upon the issuance of stock to Fidelity's stockholders and transfer stamp taxes upon transfers by Fidelity of its right to receive Fidelity Baltimore stock and of its portfolio of securities.

The District Judge, however, was of the view that, by virtue of §34a of the National Banking Act, the identity of Fidelity was continued in the consolidated institution just as was that of Baltimore. He thus concluded that there had been no taxable transfer by Fidelity to its stockholders or to the consolidated institution, and that no

original issue stamps were due with respect to the stock issued to Fidelity's stockholders. With this, we disagree.

If, from an economic point of view, one seeks symmetry in the stamp taxes imposed by §1802 of the Revenue Code of 1939,[2] he will find but little. Transfers of legal titles are taxed. Imposition of the tax is dependent largely upon form, and, with some specific statutory exceptions, absence of change in beneficial or economic relations does not defeat imposition of the tax upon a transaction within the general provisions of the statute. Technicalities, often attenuated, determine the line between the taxable and the nontaxable.

When two corporations merge or consolidate, each may be said to have contributed its net assets to the newly undertaken joint venture. Each might be said to have contributed, as such, its stated capital, its capital surplus, and its accumulated earnings. The stockholders of neither, however, make any contribution of fresh capital. All that they do is to approve an agreement that the businesses of the corporations be combined and thereafter conducted under one corporate roof. The amalgamation works a change in the assets underlying the stock of the stockholders of each constituent, but there is no new capital. Except to the extent that accumulated earnings may be capitalized in the transaction, the new stock issued in exchange for the old stock of each constituent is not "original" in any practical or economic sense. It is only a substitute, the new certificates taking the place of the old as to which original issue stamp taxes were fully paid.

Nevertheless, from the language of the statute and its history of administration and interpretation, it is now beyond question that original issue and transfer tax stamps are required as a result of such mergers or consolidations.[3] What phases of the transaction are taxable, however, will vary with the form in which it is cast. Handled as a tra-

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[2] This merger was accomplished before the effective date of the 1954 Code.

[3] See Raybestos-Manhattan, Inc. v. United States, 296 U.S. 60, 56 S. Ct. 63, 80 L. Ed. 44.

ditional consolidation, a newly formed corporation succeeding to the rights, assets and obligations of the constituents, original issue stamps must be affixed to the stub of each new stock certificate and transfer stamps to each old certificate surrendered in exchange for the new. On the other hand, if, as in the traditional merger, one of the constituent corporations becomes the surviving one, a technical variant of a consolidation without economic significance, the surviving corporation has not, in a technical sense, transferred to its stockholders any right to receive new stock. Thus no transfer taxes are due when the old stock of that constituent is surrendered for new, and original issue stamps are required on that phase of the transaction only if, and to the extent that, the aggregate par value of the new stock exceeds that of the surviving constituent for which it is exchanged. In a merger, however, both original issue and transfer stamps are due upon the exchange of new stock for the old stock of those constituent corporations which do not survive.

Under these circumstances, there is nothing unreasonable in the suggestion of the District Court and of the taxpayer, that Congress might create a new kind of hermaphroditic corporate union in which each of the constituent corporations would retain its identity, sex, character and flavor in a legal and technical sense, and that in that event, no transfer would take place, and the disputed stamp taxes would not be due. The question is whether Congress has provided for such a union of national and state banks.

Fidelity-Baltimore concedes that if this be regarded as a traditional merger, it is not entitled to recover any of the disputed stamp taxes it paid. Its position that it is not a traditional merger is supported, however, only by certain of the provisions of §34a. That Section does provide in part, of course, that the identity of each constituent bank shall be merged into and continued in the consolidated bank, and that the consolidated bank shall be deemed to be the same corporation as each of the constituents. On its face, that sounds like a provision for the kind of hermaphrodite for which the taxpayer contends the Congress made provision.

That part §34a of the National Banking Act, however, was adopted as a response to a particular problem. The Supreme Court had held in 1929, in Ex Parte Worcester National Bank, 279 U. S. 347, that after the merger of a state bank into a national bank under the National Banking Act, the identity of the state bank was lost and the consolidated bank could not act as an executor under a previous appointment by a probate court of the state bank. Amalgamations of national and state banks were impeded by that decision and by restrictive state laws, with the result that in the Banking Act of 1933,[4] the provision upon which the plaintiff relies was added to §34a of the National Banking Act. There is no evidence whatever that the 1933 amendment was intended to do anything other than to preserve to the consolidated corporation previously existing rights of the state bank constituents, including those rights it exercised under fiduciary appointments of state courts. There is nothing to suggest that the Congress had in contemplation any modification of the stamp tax obligations which would be incurred in the course of a merger for which provision already existed in the unamended statutes. That the Congress did not intend by the 1933 amendment to provide for the kind of hermaphroditic institution which Fidelity-Baltimore contends resulted is strongly indicated by the fact that the amended statute continues the requirement that the resulting corporation shall operate under the charter of the national bank. Pursuant to that requirement the state charter is necessarily abandoned, and it is plain that the resulting national bank may not thereafter conduct its business in violation of federal law though in accordance with what state banks may do under state law. Though the consolidated national bank succeeds under the statute to all of the state created rights of a state bank constituent, state laws subsequently adopted may neither enlarge nor detract from such rights.[5] In the nature of

[4] 48 Stat. 190.

[5] Hofheimer v. Seaboard Citizens' National Bank of Norfolk, 154 Va. 392, 150 S.E. 581, which, however, was decided before the 1933 amendment.

things, the consolidated national bank could not remain subject to state regulation which was incompatible with federal requirements.

In the decided cases, there is very little to guide us.

Our conclusion finds some support in First Trust Co. of St. Paul v. United States, D.C. Minn., 15 F. Supp. 634. There, state financial institutions were merged under a state statute providing that the corporate existence of each should be merged into the consolidated corporation, a provision which the state interpreted to mean that the identity of each of the constituents was preserved and continued. The court held that, for the purpose of stamp tax requirements, the union of those institutions should be treated as a conventional consolidation. It indicated that application of the tax stamp statutes was a matter of federal rather than state law, but plainly the federal statute imposes the tax on the basis of the state created relationships. If a state statute requires that such amalgamations be in the form of a traditional merger, federal law does not impose stamp taxes on the basis that what was done was the equivalent of a traditional consolidation permitted under the laws of other states. Imposition of the tax is governed by the form in which the transaction is cast, provided it is within the authorization of state law, and, obviously, the provisions of state law considered in First Trust Co. of St. Paul v. United States affected the form of the transaction in precisely the same way as that part of §34a upon which Fidelity-Baltimore relies affects the transaction here. In each case, the transaction was cast in the form of a traditional merger or consolidation, and in neither case is the statutory provision for the continuation of the identity of the constituents effective to alter the form in which the transaction was actually cast. As we noted at the outset, it is the form of the thing which governs the imposition of stamp taxes.

We find little support in United States v. Seattle-First National Bank, 321 U.S. 583, upon which the Government strongly relies. There, it appeared, as here, a state bank had been merged into a national bank, and the question was

whether stamp taxes were payable upon the transfer of portfolio securities previously owned by the state bank, securities held in fiduciary capacities by the state bank, and the state bank's real estate. The Supreme Court held that all such transfers occurred "by operation of law" and were, therefore, exempt under the administrative regulations then in effect. The United States insists that the Supreme Court could not have reached the question of exemption, unless it first held that transfers had occurred. It is clear, however, that certiorari was granted to resolve a conflict between the circuits on the exemption question, and that the Supreme Court addressed itself solely to that question. The fact that it assumed that transfers had occurred which would have been taxable, if not exempt, is far from an explicit command to us when faced with the question of transfer *vel non*. The Supreme Court did not mention that part of §34a upon which the taxpayer here relies, though the trial court had mentioned those provisions in connection with its consideration of the passage of legal title to the real estate of the state bank.[6] Our conclusion is in accord with the implicit assumption of the Seattle Bank case, but assumptions of answers to unraised questions are not the firmest foundation for subsequent judicial decision.

The Seattle Bank case does not permit us to dispose of the question here on the exemption basis, however, for, after the Seattle Bank decision by the Supreme Court, the Congress expressly provided that, with certain exceptions, transfers not otherwise exempt shall not be exempt because effected by operation of law.[7] Transfers of the sort with which we deal are not among the statutory exceptions. The Congress thus emphasized its intention that stamp taxes be imposed in exactly the kind of context with which we are concerned.

The taxpayer finds support for its position in United States v. Northwestern N. t. Bank & Trust Co. of Minneapolis, 8 Cir., 137 F. 2d 761, and Old National Bank in

[6] See Seattle-First National Bank v. United States, E.D. Wash., 44 F. Supp. 603.

[7] 26 U.S.C.A. §1802(c).

Evansville v. Commissioner, 7 Cir., 256 F. 2d 639, but we find neither persuasive.

In the Northwestern Nat. Bank case, the court was concerned with declared value capital stock taxes due by a consolidated national bank after the merger of a state bank into it. It concluded that the national bank was not required to increase the previously declared value of its capital stock by the amount of the capital additions it acquired in the merger with the state bank. The court relied upon the language of §34a, upon which the contentions of the taxpayer here are bottomed. It reasoned that each of the banks continued in existence, holding, in effect, that the national bank had acquired nothing from the state bank. The decision supports the taxpayer's position, but it seems obvious to us that the consolidated institution did acquire capital from the state bank. If, as the court reasoned, the identities of the constituent banks are to be kept separate after the consolidation, so that the national bank could file capital stock returns without regard to the effect of the merger, there should have been a concomitant requirement that the still separably identified state bank file separate returns and pay the taxes due. The tax statutes, however, require that the consolidated corporation file one return, and that the one return reflect the effects of the merger.

The Old National Bank in Evansville case has little bearing upon the present question. After the merger of a state bank into a national bank, the consolidated national bank sought to avail itself of an unused excess profits tax credit, which the state bank had at the time of the merger. It was shown that the consolidated bank had substantial profits from the operations of the units it acquired in the merger with the state bank against which the entire amount of the unused profits tax credit could be utilized. The essential question was whether the demonstrated profits arose out of a continuing enterprise in which the tax credit had previously been earned within the rule of Libson Shops, Inc. v. Koehler, 353 U.S. 382. The holding that it was would seem to have little relation to the present case, ex-

cept that the court relied in part upon the provision of §34a which is before us. That Section had not been relied upon by the taxpayer nor mentioned by the Tax Court. While the Court of Appeals buttressed its conclusion by reference to that Section, the court's conclusion is fully supportable without it. At least, the decision does not suggest that amalgamating banks shall be exempt from stamp taxes uniformly imposed upon other amalgamating corporations.

We, therefore, find that Old National Bank in Evansville has little bearing on the present question and the Northwestern National Bank case unpersuasive.

While we find little guidance in the decided cases, we cannot escape the fact that the union of Baltimore and Fidelity was accomplished as a traditional merger. That it be achieved in that manner is a specific requirement of the National Banking Act. In the process, the state bank was necessarily swallowed up, and thereafter in no real sense can it be said to have had a separable identity. As is said in 15 Fletcher, Private Corporations 371, §7199 (1960 ed.) of the National Banking Act:

> "* * * Its words are explicit to the point that the consolidation or merger shall be 'under the charter of such national banking association.' This of itself would seem to be clearly indicative of the intent that upon its consolidation with or merger into a national bank the state bank shall go out of existence and the latter continue its existence and identity under its original charter. Its functions as a national bank continue without alteration or modification. The consolidation is an absorption of the state institution with all its assets, by the national bank, which succeeds to all the rights, property, franchises, interests and powers of the state institution, so far as the exercise of them is permitted by federal legislation. * * *"

The provision of §34a for the continuation of the identity of each of the constituents can be harmonized with the requirement that the state bank be merged into the national

bank by limiting the former provision to the purpose for which it was adopted. Utilized to protect the operation of the consolidated bank and, so far as consistent with federal and state law, its enjoyment of all rights and privileges of the state bank, it usefully serves its intended office. Incidentally, it assists in answering such collateral but related questions as to whether or not a fiduciary's exchange of stock of a constituent state bank for the stock of the consolidated national bank is a change of investment beyond his authority.[8] Thus limited, it can be harmonized with the clear intendment of other provisions of the statute without impairment of its usefulness in the areas in which it was intended to operate.

We thus conclude that the provision that the consolidated bank is to be regarded as a continuation of each of the constituents did not carve out an arbitrary exception to the tax statutes, which are already arbitrary enough but easily administered, so as to exempt merging banks from stamp tax obligations uniformly imposed upon all other merging corporations. Congress might do that if it wished, but we hold that it has not yet done so.

Reversed.

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[8] See Cannon v. Dixon, 4 Cir., 115 F. 2d 913, 915.

JUDGMENT

(Filed and Entered, March 10, 1963)

United States Court of Appeals for the Fourth Circuit

No. 9078

Fidelity-Baltimore National Bank, a body corporate,
Appellee,

v.

United States of America,
Appellant.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decree of the said District Court appealed from, in this cause, be and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for proceedings not inconsistent with the opinion of the Court filed herein.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

HERBERT J. BOREMAN,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 154

FIDELITY-BALTIMORE NATIONAL BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1954, the Fidelity Trust Company, a Maryland corporation, consolidated with the Baltimore National Bank, a national banking association, under the latter's corporate charter pursuant to Section 3 of the National Banking Act, 12 U.S.C. 34a. That section, in relevant part, provides that upon such a consolidation "the corporate existence of each of the constituent banks * * * participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions." Furthermore, the consolidated bank succeeds to all the rights of the constituent banks. The taxpayer (the consolidated bank) claims that Section 3 exempts at

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from the documentary stamp taxes on the issuance of capital stock and the transfer of securities and rights to securities, made in connection with the consolidation, that would concededly otherwise be due under Sections 1802 and 3481 of the Internal Revenue Code of 1939. The district court held for the taxpayer, but the Court of Appeals for the Fourth Circuit reversed.

Petitioner's contention is based on the premise that Section 3 should be interpreted literally. The legislative and judicial history of Section 3, however, make clear that it was intended to do no more than to preserve to the consolidated corporation the previously existing rights of its constituent banks, including those rights they exercised under fiduciary appointments of State courts. See *Seattle-First Nat. Bank* v. *United States*, 44 F. Supp. 603, 609-610 (E.D. Wash.), affirmed, 136 F. 2d 676 (C.A. 9), affirmed, 321 U.S. 583. Compare *Ex parte Worcester Nat. Bank*, 279 U.S. 347, with *New England M. Nat. Bank* v. *Centenary Methodist Ch.*, 342 Mass. 360, 173 N.E. 2d 294. Neither the history of Section 3 nor logic suggests any reason why Congress would grant an exemption from the documentary stamp tax upon the consolidation of banks which did not apply to the merger of other corporations.

The taxpayer concedes (Pet. 5) the absence of a conflict, but nevertheless asserts (Pet. 5–7) that the decision below conflicts in principle with *Old Nat. Bank in Evansville* v. *Commissioner*, 256 F. 2d 639 (C.A. 7), and *United States* v. *Northwestern Nat. Bank & T. Co. of Minneapolis*, 137 F. 2d 761 (C.A. 8). The former case held that the taxpayer, a national bank, had the right to carry over an unused excess

profits tax credit of a state bank after the latter had merged with the national bank. As the Fourth Circuit pointed out, the case was governed by *Libson Shops, Inc. v. Koehler*, 353 U.S. 382, and "has little bearing on the present case" (Pet. App. 26a). Nor, we believe, is the *Northwestern Nat. Bank* case apposite, since it related not to the documentary stamp taxes, but to the wholly unrelated capital stock tax which originated as a temporary measure in Section 215 of the National Industrial Recovery Act (48 Stat. 195, 207), was incorporated in the Internal Revenue system by Section 701 of the Revenue Act of 1934 (48 Stat. 680, 769), and was repealed by Section 201 of the Revenue Act of 1945 (59 Stat. 556, 574).[1]

Finally, the issue involved here is not of substantial importance. The statutory provisions under consideration have existed since 1933 without previously having been the subject of any litigation. Thus, even if the taxpayer could show a conflict, it would plainly not be of the kind requiring resolution by this Court.

For these reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1964.

[1] In addition, we believe, as the court of appeals suggested (Pet. App. 26a-27a), that the decision in *Northwestern Nat. Bank* was erroneous.